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GOOGLE INC.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 ORACLE AMERICA, INC.,

Case No. 3:10-cv-03561 WHA

16 Plaintiffs,

**DEFENDANT GOOGLE INC.'S
RESPONSE REGARDING MODIFIED
PROPOSED JURY INSTRUCTIONS ON
FAIR USE (ECF NO. 1688)**

17 v.

18 GOOGLE INC.,

19 Defendant.

20 Dept.: Courtroom 8, 19th Fl.
21 Judge: Hon. William Alsup

1 Defendant Google Inc. (“Google”) respectfully submits this response to the requests
 2 contained in the Court’s Modified Proposed Jury Instructions On Fair Use. ECF No. 1688.

3 In its April 19 Order, the Court directed the parties to meet and confer in person and try to
 4 agree on the Court’s modified proposed fair use instructions and, if the parties could not agree, to
 5 state all objections in a brief. As counsel reported during the pretrial conference on April 27, the
 6 parties have met and conferred, and have reached agreement on a number of changes to the
 7 Court’s modified proposed instructions. The parties are filing separately a joint statement
 8 regarding those agreed revisions.

9 **I. Google’s Objections to the Modified Instructions**

10 Google objects to the Court’s modified instructions in the following respects.¹

11 **A. The “propriety of the accused infringer’s conduct”**

12 Google objects to the inclusion in the jury instructions of the paragraph beginning on line
 13 15 of page 4 regarding the “propriety of the accused infringer’s conduct” and “good faith.”

14 In its exhaustive review of the principles of fair use law that it deemed applicable in this
 15 case, the Federal Circuit made clear that the first fair use factor “involves ***two*** sub-issues,” namely
 16 whether the new work is transformative and whether the use serves a commercial purpose.
 17 *Oracle Am. v. Google Inc.*, 750 F.3d 1339, 1374 (Fed. Cir. 2014) (emphasis added). The Federal
 18 Circuit clearly considered *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985), in
 19 its careful review of fair use precedent—and it did not identify any issue of “good faith” as
 20 relevant to the first factor in this case. The Federal Circuit did so even though the Court in
 21 *Harper* said that, in view of the facts of that case, the “propriety of the defendant’s conduct” was
 22 relevant. Despite its “detailed examination of fair use,” 750 F.3d at 1374, and its direction to this
 23 Court to provide the jury on remand with “a clear and appropriate picture of the fair use defense”
 24 and to do so “consistent with this opinion,” *id.* at 1377, the Federal Circuit did not use either the
 25 phrase “good faith” or the word “propriety” anywhere in its opinion.

26 The reason for this omission by the Federal Circuit is apparent: *Harper & Row* involved

27 ¹ Google discusses herein its significant, substantive objections to the Court’s modified proposed
 28 instructions. Google reserves its suggestions for specific wording or other more minor
 modifications to the Court’s proposed instructions.

1 an ***unpublished*** work of which the defendant had obtained a “purloined copy” and had published
 2 the excerpts of President Ford’s memoirs based on the unauthorized, temporary possession of that
 3 purloined copy. *Harper*, 471 U.S. at 542 (a “purloined manuscript” from “an undisclosed
 4 source”); *id.* at 543 (“unidentified person secretly brought a copy” of manuscript to The Nation;
 5 editor “knew that his possession of the manuscript was not authorized”); *id.* at 563 (“knowingly
 6 exploited a purloined manuscript”). The *Harper* Court emphasized numerous times in its opinion
 7 that the work at issue was an unpublished work—the Court used the word “unpublished” no
 8 fewer than 25 times in its opinion, including in each of the first two sentences of the opinion.
 9 And the *Harper* Court recognized that unpublished works have historically received special
 10 protection, particularly with respect to the right of first publication, *id.* at 550-52, and that the
 11 unpublished status of a work should “figure prominently in fair use analysis.” *Id.* at 553.

12 For these reasons, the conduct of the defendant in *Harper*—which had knowingly made
 13 use of an unauthorized, “purloined copy” of an unpublished work—was relevant to its fair use
 14 defense. There are no comparable facts regarding Google’s conduct. Google used publicly-
 15 available specifications for the Java SE API packages that had been published widely by Sun and
 16 were freely available, that Sun had encouraged programmers to learn and use as part of the Java
 17 language, that Sun had allowed others (including GNU Classpath and Apache) to use to create
 18 independent implementations, and that Google believed could—like other open API
 19 specifications—be used to create an independent implementation. Google did not “secretly”
 20 obtain an “unauthorized” or “purloined” copy of the API specifications in any respect; its conduct
 21 was as far removed from using a purloined copy of an unpublished work as can be imagined. The
 22 language from *Harper* regarding the “propriety of the defendant’s conduct” is therefore
 23 inapplicable in this case and should not be included in the Court’s instructions.

24 Even *Nimmer On Copyright*, the authority cited by the *Harper* Court on this issue,
 25 agrees—especially in light of the Court’s subsequent decision in *Campbell v. Acuff-Rose Music,*
 26 *Inc.*, 510 U.S. 569 (1994). As Nimmer points out, the Court in *Campbell* “retreated” from its
 27 stance in *Harper*, stating that “Even if good faith *were* central to fair use, 2 Live Crew’s actions
 28 do not necessarily suggest that they believed their version was not fair use.” *Nimmer On*

1 Copyright § 13.05[A][1][d] (quoting *Campbell*, 510 U.S. at 585 n.18) (emphasis Nimmer's). As
 2 the *Campbell* Court stated:

3 Finally, regardless of the weight one might place on the alleged infringer's
 4 state of mind, we reject Acuff-Rose's argument that 2 Live Crew's request for
 5 permission to use the original should be weighed against a finding of fair use.
 6 Even if good faith were central to fair use, 2 Live Crew's actions do not
 7 necessarily suggest that they believed their version was not fair use; the offer may
 8 simply have been made in a good-faith effort to avoid this litigation. If the use is
 9 otherwise fair, then no permission need be sought or granted. Thus, being denied
 10 permission to use a work does not weigh against a finding of fair use.

11 510 U.S. at 585 n.18. Based on this language, Nimmer concludes that "an inquiry into
 12 defendant's state of mind does not necessarily belong in the fair use calculus." *Nimmer On*
 13 *Copyright* § 13.05[A][1][d]; *accord*, P. Leval, Toward a Fair Use Standard, 103 HARV. L. REV.
 14 1105, 1126-27 (1990) (identifying good faith as a "false factor" that "divert[s] the [fair use]
 15 inquiry from the goals of the statute," "produces anomalies," and "adds to the confusion
 16 surrounding the doctrine"; stating that the fair use inquiry "should focus not on the morality of the
 17 secondary user, but on whether her creation claiming the benefits of the doctrine is of the type
 18 that should receive those benefits" and that "no justification exists for adding a morality test").

19 The other authorities cited by Oracle in support of its request for a "good faith" instruction
 20 on the first factor, ECF No. 1707 at 16-17, do not support the request. *Fisher v. Dees*, 794 F.2d
 21 432 (9th Cir. 1986), is a pre-*Campbell* decision in which the court concluded that the plaintiffs
 22 "failed to identify any conduct of [the defendant] that is sufficiently blameworthy," found that the
 23 defendant's use of the plaintiff's song after having been refused permission did not show bad
 24 faith, 794 F.2d at 437, and affirmed a summary judgment of fair use. *Id.* at 440. In *Los Angeles*
 25 *News Service v. KCAL-TV Channel 9*, 108 F.3d 1119, 1122 (9th Cir. 1997), the Ninth Circuit's
 26 language on this issue—post-*Campbell*—was limited and guarded: it stated that the propriety of
 27 the defendant's conduct is relevant on the first fair use factor but only "at least to the extent that it
 28 may ***knowingly have exploited a purloined work*** for free that it could have obtained for a fee."
 (emphasis added). The Ninth Circuit, in other words, has recognized that it is only facts like
 those in *Harper*, involving a "purloined work," that make the defendant's conduct relevant to a
 fair use analysis. Finally, Judge Whyte's decision in *Religious Tech Ctr. v. Netcom On-Line*
Comm., 923 F. Supp. 1231 (N.D. Cal. 1995), is consistent with the above authorities. In

1 *Religious Tech*, Judge Whyte (citing *Nimmer*) noted that *Campbell* “hardly endorses the good
 2 faith requirement,” 923 F. Supp. 1244 n. 14, and, consistent with the limited nature of the “good
 3 faith” inquiry, considered whether the defendant had obtained copies of the plaintiff’s works
 4 “through deceit,” in “some unlawful or illegitimate manner,” or “in an improper manner.” Absent
 5 any allegation of such conduct—and there is none in this case—good faith has no place in the fair
 6 use calculus and the jury should not be told to consider it.

7 No court has identified “good faith” as a separate, third inquiry under the first fair use
 8 factor. As drafted (and as requested by Oracle), the Court’s modified instructions could easily
 9 suggest to jurors that “good faith” is as important to the inquiry under the first factor as
 10 transformativeness and commerciality. That would be unprecedented and inconsistent with the
 11 authorities cited above, and inconsistent with the Federal Circuit’s opinion and direction. And the
 12 language of the Court’s modified instruction is in any event inapplicable, as it refers to good faith
 13 being absent where, “for example, the intended purpose is to supplant the copyright holder’s
 14 commercially valuable right of first publication.” ECF 1688 at 16-18. While such an instruction
 15 may have been appropriate in *Harper*—where an unpublished work was at issue—it would only
 16 confuse our jury, as there are no issues relating to any “right of first publication.”

17 **B. A work need not change the original work to be transformative.**

18 The Court’s modified proposed instructions include a statement that a use “is
 19 transformative only where a defendant ***changes a plaintiff’s copyrighted work*** or uses a
 20 plaintiff’s copyrighted work in a different context ***such that the plaintiff’s work is transformed***
 21 ***into a new creation.*** ECF 1688 at 3-4 (emphases added). This language is incorrect as a matter
 22 of law and should not be included in the jury instructions.

23 One need look no further than *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984),
 24 for clear precedent that no change in the plaintiff’s work need be made for a use to be a fair use.
 25 In *Sony*, the evidence showed that the recorders at issue were used for the purpose of reproducing
 26 the entire works that were broadcast; there is no suggestion in the Court’s decision that the
 27 broadcast works were changed in any way or transformed in any respect. 464 U.S. at 450-51.
 28 The home time-shifting in *Sony* was nonetheless confirmed to be a fair use. *Id.* at 455-56.

1 While *Sony* did not discuss transformativeness per se, there can be no debate that the
 2 outcome in *Sony* would have been the same under current fair use jurisprudence. The Ninth
 3 Circuit, moreover, has considered this precise issue more than once—and has consistently ruled
 4 that, as it “determined in *Kelly*,” “even making an exact copy of a work may be transformative so
 5 long as the copy serves a different function than the original work.” *Perfect 10, Inc. v.*
 6 *Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *see also Kelly v. Arriba Soft Corp.*, 336
 7 F.3d 811, 818-19 (9th Cir. 2002) (finding use of “exact images” transformative and fair use).

8 The Ninth Circuit has gone farther, moreover, and has specifically recognized that a work
 9 may be transformative *either* when it transforms the first work “into a new work” *or* incorporates
 10 the first work “as part of a broader work.” *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1176
 11 (9th Cir. 2012). As the Court is aware, the Federal Circuit quoted this specific language from
 12 *Monge* in its detailed fair use analysis. *Oracle Am.*, 750 F.3d at 1374. It therefore recognized
 13 that this language from *Monge* was relevant in this case.

14 Recent additional authority on fair use confirms this conclusion. In *The Authors Guild v.*
 15 *Google Inc.*, 804 F.3d 202, 214 (2d Cir. 2015), *cert. denied*, ___ U.S.L.W. ___ (U.S. Apr. 18, 2016),
 16 Judge Leval stated succinctly that “a transformative use is one that communicates something new
 17 and different from the original *or expands its utility*, thus serving copyright’s overall objective of
 18 contributing to public knowledge.”

19 The language proposed by Google in its proposed instruction number 11—which
 20 recognizes both that a new work is transformative when it “incorporates the elements of the first
 21 work into a broader work” and that the new work “need not change the elements of the original
 22 work in order for the new work to be transformative,” ECF No. 1703 at 31-32—is therefore
 23 proper. This language is, moreover, consistent with the language from *Campbell* that the Federal
 24 Circuit quoted and that the Court recently added to its instructions at the request of both parties,
 25 namely that a work is transformative “if it adds something new” and that the “critical question” is
 26 whether the new work “merely supersedes” the original or “instead adds something new.” ECF
 27 No. 1688 at 3, lines 24-27; *see Oracle Am.*, 750 F.3d at 1374 (quoting *Campbell*, 510 U.S. at
 28 579). Without clarifying that the defendant can add something new without changing the

1 elements of the original work, the Court’s instructions may well confuse the jury.

2 The proper focus of transformativeness is not on the “expressive content or message” of
 3 the portions of the first work that are used by the defendant and whether *those portions* have been
 4 changed or not; the focus is on the two works as a whole, i.e., does the defendant’s new work
 5 alter or add “new expression, meaning or message” to what was used from the first work, such
 6 that *the new work*—not the portions of the new work that were used from the first work—is
 7 transformative when compared to the first work. *Campbell*, 510 U.S. at 578-79 (“central
 8 purpose” of the transformativeness inquiry is “whether and to what extent *the new work* is
 9 transformative”) (emphasis added). The Federal Circuit appreciated this distinction as well; it
 10 stated, quoting *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1176 (9th Cir. 2013), that a work is not
 11 transformative where the user makes no alteration to the expressive content *of the original work.*¹
 12 *Oracle Am.*, 750 F.3d at 1374 (emphasis added). This language does not require that any changes
 13 or alteration to the elements of the original work used by the defendant, or that the original work
 14 be changed into a “new creation,” and makes clear that the relevant comparison of the
 15 “expressive content” is between the original work and the new work as a whole.

16 Google submits that it is important for the Court to clearly instruct the jury on
 17 transformativeness. In order to do so in a manner that is consistent with both Supreme Court
 18 precedent and the Federal Circuit’s opinion, the Court should, in view of the above, both remove
 19 the language stating that alteration of the elements of the first work is required and add the
 20 “broader work” and “need not change” language contained in Google’s proposed instruction.

21 C. **An adequate definition of “derivative work”**

22 Google also objects to the Court’s modified instructions on the grounds that they fail to
 23 adequately and fully instruct the jury on what will be an important issue, namely, what a
 24 “derivative work” is under the copyright laws. The instructions, on page 7, contain a
 25 one-sentence definition of derivative work that is based on the statutory definition contained in
 26 17 U.S.C. § 101. The jury will need additional guidance on this issue, however, in order to
 27 properly and fairly consider the relevance of the evidence that will be presented by Oracle.

28 As the Court knows, the Supreme Court in both *Harper* and *Campbell* stated that the

1 inquiry under the fourth factor must take into account “harm to the market for derivative works,”
 2 *Campbell*, 510 U.S. at 590; *Harper*, 471 U.S. at 568, and the Court recently added language
 3 regarding derivative works to the instructions based on these authorities, at Oracle’s request. As
 4 the Court also knows, Oracle has recently pointed to all sorts of alleged uses for and alleged
 5 potential markets for Java ME (also called “J2ME”) as part of its arguments on the fourth factor,
 6 as well as in connection with its damages claims.

7 In order for this evidence to be relevant on either the fourth fair use factor or on damages,
 8 however, Oracle must prove that “Java ME” is in fact a derivative work, under the copyright
 9 laws, of the Asserted Works in suit, namely ***Java 2 SE versions 1.4 and 5.0***. The term
 10 “derivative work” under the copyright laws has a very specific meaning that has been well-
 11 developed in the case law, and the status of one work as a claimed derivative work of another
 12 must be proven. It is simply not enough to say “Java is Java and all Java software is derivative of
 13 all other Java software, so Java ME should be treated as a derivative work—for fair use analysis
 14 purposes—of the two specific Java SE 1.4 and 5.0 works in suit.” That is precisely the improper
 15 type of “all of Java against all of Android” broad-brush approach that Oracle has frequently taken
 16 throughout this lawsuit and that the Court has recognized as improper. Tr. (4/17/2012) at 227
 17 (THE COURT: Let me say a few things first about this. This trial is not Java against Android.
 18 This trial is not about all of Java.”); *id.* at 228 (“It is not Java against Android. . . you may not
 19 leave the impression that this case is all of Java against all of Android. It is not.”)

20 The derivative work issue is a very specific one. For Oracle’s evidence regarding Java
 21 ME to be relevant, one or more specific, identified versions of Java ME must be derivative
 22 works—within the meaning of the statutory definition—of one or both of the Asserted Works and
 23 must be derivative works with respect to the elements of the 37 Java SE API packages used in
 24 Android.

25 Google’s proposed instruction on derivative works, ECF 1703 at 54-55, has two critical
 26 aspects. First, the proposed instruction correctly instructs the jury that not all works that include
 27 some elements of a pre-existing work qualify as derivative works of that pre-existing work; the
 28 second work must “be based ***in whole or in substantial part*** upon the pre-existing work and ***must***

1 *incorporate portions of the pre-existing work that are covered by the copyright* in the pre-
 2 existing work.” (emphases added). *Micro Star v. Formgen*, 154 F.3d 1107, 1110 (9th Cir. 1998)
 3 (“in order to qualify as a derivative work . . . [the] work . . . must substantially incorporate
 4 protected material from the preexisting work”); *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th
 5 Cir. 1984) (“The little available authority suggests that a work is not derivative unless it has been
 6 substantially copied from the prior work.”); *see also Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d
 7 1068, 1079 (9th Cir. 2000) (“a derivative work, unlike a compilation, must incorporate that which
 8 itself is the subject of copyright”); 1 *Nimmer On Copyright* § 3.01 (derivative work must be based
 9 “in whole, or in substantial part” on the pre-existing work; work is not derivative “unless it has
 10 substantially copied from a prior work”).

11 Second, the proposed instruction tells the jury, in accordance with the plain language of
 12 Section 103(b) of the Copyright Act, 17 U.S.C. § 103(b), that the copyright in a derivative work
 13 “extends only to the new material contained in the derivative work, as distinguished from any
 14 material from the pre-existing work that is included in the derivative work.” This portion of the
 15 instruction is important because the jury will need to determine, as noted above, whether an
 16 identified version of Java ME contains portions of Java 2 SE 1.4 or 5.0 that were new in one of
 17 those two specific editions of Java 2 SE and are therefore protected by the copyrights in those
 18 works. If not, “Java ME” simply does not qualify as a derivative work of either Java 2 SE 1.4 or
 19 5.0, just as Java ME cannot qualify as a derivative work of Java 2 SE 1.4 or 5.0 if the API
 20 elements that are common to Java 2 SE, Java ME, and Android predicated Java 2 SE 1.4 and 5.0,
 21 i.e., if they were included in and therefore protected by earlier versions of Java 2 SE as opposed
 22 to versions 1.4 or 5.0. If that is the case—and it almost surely is for many of the common, core
 23 package API elements that were included in the early versions of both Java 2 SE and Java ME
 24 that predicated the Asserted Works—then there is no basis for Java ME to be considered to be a
 25 derivative work of either of the two works in suit. The statutory definition requires that a work
 26 can only be a derivative work of a “pre-existing work,” i.e., of one that existed before the claimed
 27 derivative work was created. 17 U.S.C. § 101 (definition of “derivative work”).

28 Oracle’s complaint that Google’s proposed instruction “includes information far beyond

1 the scope of the case and thus risks confusing the jury about irrelevant topics,” ECF No. 1707 at
 2 44, is therefore incorrect. Oracle has chosen to attempt to introduce into this case significant
 3 issues relating generally to “Java ME” on the premise that Java ME is a “derivative work” under
 4 the copyright laws. That premise must be proven, not assumed, and the jury may need to decide
 5 whether some or all of Oracle’s evidence and arguments regarding Java ME have a proper basis.
 6 To do that, the jury will need an adequate and complete instruction regarding the definition of a
 7 derivative work.

8 **D. The fourth fair use factor**

9 Google appreciates the Court’s desire to give the jury adequate guidance on the fourth fair
 10 use factor regarding market harm, and that the issue is a complex one. The Court’s modified
 11 instructions, however, now contains a first paragraph on the fourth factor that summarizes the
 12 necessary principles, ECF No. 1688 at 6, lines 16-27, followed by three additional paragraphs, *id.*
 13 at 7, line 1 to 8, line 9, that Google believes have significant potential to confuse the jury. For
 14 example, the instructions now refer to comparisons of the “market value” of the Asserted Works
 15 before and after the accused use “on a qualitative and directional basis,” *id.* at 7, lines 14-22, and
 16 refer to “Oracle’s copyright interest in Android.” *Id.* at 7, lines 8-9. These concepts will not
 17 necessarily apply to the evidence the jury will hear and it will therefore be difficult for the jury to
 18 derive benefit from these paragraphs of the instructions. And Oracle has no “copyright interest in
 19 Android” whatsoever if Google’s use was a fair use.

20 Google submits that the first paragraph of the Court’s modified instructions on the fourth
 21 factor gets the job done—or nearly so. The Court has added to that paragraph language about
 22 derivative works, as Oracle requested in its critique of the Court’s original draft instructions, and
 23 has also added language regarding the relative importance of the fourth factor, also as requested
 24 by Oracle. Google’s proposed instruction number 15 on the fourth factor, ECF No. 1703 at 45,
 25 also recognizes that a use can be fair even if it causes some market harm, that harm caused by a
 26 transformative use that does not serve as a substitute for the original work is not cognizable under
 27 the fourth factor, and that the relevant “work” for purposes of the fourth factor is the work as a
 28 whole. With those additions and an adequate definition of “derivative work,” the instructions will

1 provide the jury with simpler instructions on the fourth factor that are consistent with the Federal
 2 Circuit's one-paragraph discussion of this factor. *Oracle Am.*, 750 F.3d at 1376.

3 **E. Other objections**

4 The foregoing are Google's primary substantive objections to the Court's modified
 5 instructions. Google continues to believe, however, that a number of other portions of the Court's
 6 modified instructions should also be changed.

7 Google cannot agree that the instructions should say that "all agree" that Google's use of
 8 the declaring code and SSO "constituted copyright infringement" unless Google carries its burden
 9 as to fair use. ECF 1688 at 2, lines 4-7. Google has equitable defenses that have not yet been
 10 decided and, more importantly, Google must be allowed to continue to preserve for further
 11 appellate review the copyrightability issue that has, for purposes of the present trial, been
 12 resolved by the Federal Circuit. In the event of future appellate proceedings, Google will be able
 13 to raise the copyrightability issue if necessary—especially in view of the fact that Oracle argued,
 14 in opposition to Google's petition for certiorari, that the Supreme Court should not grant certiorari
 15 because the case was still in an interlocutory posture since fair use had not yet been decided.
 16 More specifically, Oracle argued to the Supreme Court in 2014 that the Court should deny cert on
 17 the copyrightability issue at that time because "this Court could benefit from a fully developed
 18 fair-use record." Oracle Brief In Opposition, No. 14-410 (U.S. Dec. 8, 2014) at 37.

19 Google continues to believe that the instructions with respect to transformativeness should
 20 continue to include references to whether a work is "productive" and "adds value," *see* ECF No.
 21 1678 at 2—as the Court's original draft instructions properly did. Google further submits that the
 22 Court's instructions should include an instruction, consistent with the parties' stipulation, *see*
 23 ECF No. 1709 at 4-5, specifically to the effect that the Java programming language is "open and
 24 free for anyone to use." *See* ECF No. 1703 at 8 (Google Proposed Instruction No. 3); ECF No.
 25 1704 at 1-2. Finally, Google also believes, for the reasons Google stated in its memorandum in
 26 support of its proposed instructions, that the reference in the instructions to "notice," ECF No.
 27 1688 at 2, line 25, is inappropriate and may confuse the jury. *See* ECF No. 1704 at 3.

1 DATED: April 28, 2016
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